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IN THE

Supreme Court of the United States

October Term, 1957.

No. 418

LAWRENCE JOHNSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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Petitioner Lawrence Johnson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on August 6, 1957.

Opinion Below

The opinion of the Court of Appeals in this proceeding has not yet been reported. This opinion is set forth as an Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on August 6, 1957. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The questions presented in this case relate to the conflict of the decision of the Court of Appeals in this case with

the decision of this Court in *Curcio* v. *United States*, 354 U. S. 118; to the sufficiency of the evidence supporting the district judge's finding that certain non-produced records of a dissolved corporation continue to exist and the duty of petitioner as former president of said corporation to produce such records before a grand jury or be adjudged in criminal contempt; and to the sufficiency of petitioner's showing of good faith compliance with the direction of the district court to produce said records and that all such existing records have been produced.

Statute Involved

The statute involved in this case is Title 18, United States Code, Section 401(c), which reads as follows:

Power of Court

A court of the United States shall have power to punish by fine and imprisonment, at its discretion, such contempt of its authority, and none other, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. (June 25, 1948, ch. 645, ¶ 1, 62 Stat. 701.)

STATEMENT OF THE CASE

Proceedings Below

Petitioner Lawrence Johnson was convicted of criminal contempt of court in the District Court for the Southern District of New York, for failing to produce before a grand jury, in response to two subpoenas *duces tecum*, certain corporate books and records of Brakes, Inc., a dissolved corporation of which petitioner had been president. On May 21, 1957 petitioner was adjudged in contempt and sentenced to 60 days imprisonment; he was paroled in the custody of his attorney pending appeal and he remains under this parole pending review by this Court. The district court held that the non-produced books and records continued to exist at the time the subpoenas were served and that petitioner's efforts to purge himself of the contempt were insufficient. The Court of Appeals affirmed this finding on August 6, 1957, but stayed its mandate pending review in this Court.

The Record

The record of this case before the Court of Appeals was a printed appendix containing all of the proceedings of the district court, and a certified copy of this appendix and the opinion of the Court of Appeals is submitted with this petition.[1]

The Facts

Brakes, Inc. was a New York corporation engaged in performing certain government contracts for the New York office of the Ordnance Department of the Army (57-59).

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[1] Wherever numbers in parentheses are indicated, they refer to pages in this printed Appendix.

These contracts provided for Brakes, Inc. furnishing certain automotive brake parts of the Ordnance Department. The last of these contracts was completed in about April 1954 (69), and in about October 1954 Brakes, Inc. went out of business (97). It was formally dissolved on April 18, 1955 (196).

Brakes, Inc. was in the business of supplying and repairing brakes and brake parts. There were about five different "Brake" corporations (96) in several different locations, but all these corporations were affiliated or related. Brakes, Inc. maintained New York City and Long Island City locations, with about 30 to 40 people working in the Long Island City location. There were many other employees in the other locations (69, 72, 88).

Petitioner Lawrence Johnson was the president and sole stockholder of Brakes, Inc. (190-191). As such he was its chief executive officer and nominally responsible for its affairs and its books and records. Brakes, Inc. did a gross annual business of $500,000, dealing with several hundred customers per month.

In about August 1954 the Federal Bureau of Investigation undertook an investigation of Brakes, Inc. and Agent Anthony Scudari was assigned to this investigation (49, 52). He visited the Long Island City plant of Brakes, Inc. during 1954, but made no inquiry during this visit as to any books and records of the corporation. This was the only visit by any government agent to Brakes, Inc. During this visit Scudari spoke to a Mr. Libby and to Mrs. Ilse Hammerstein, but he asked them for no books and records, since he was not interested in them at that time (53).

At about Labor Day 1954 Brakes, Inc. gave up its New York City office, moving all of its New York records to the Long Island City plant (78); actually records were stored at both places prior to this move. During the summer of

1954 a fire occurred at the Long Island City plant destroying certain property in the second floor storeroom, the exact nature of which is not certain. There also had been a previous fire in the basement of this location. Records had been kept both in the basement and the second floor storeroom, for records were found in both places (89).

Early in 1954 the Bendix-Westinghouse Automotive Air Brake Company brought suit against Brakes, Inc. and Lawrence Johnson. During this litigation representatives of Bendix-Westinghouse came to the offices of Brakes, Inc. at the New York City plant to look at books, documents and records. They took photographs of the premises and all of the files and records of Brakes, Inc. were submitted for inspection and copying by these representatives, which took some days to complete. A great many records were turned over to these representatives but no record was kept of what was taken and what returned (106-107). This litigation was settled by stipulation of the parties dated January 27, 1955 (107).

On or about November 25, 1955 a subpoena *duces tecum* addressed to Brakes, Inc. at Long Island City was served on Mrs. Hammerstein, the head bookkeeper of the firm, who believed then that she had been its secretary and treasurer (76-77, 184-185), and she informed the deputy marshal making the service that the corporation had previously been dissolved (97); nevertheless she accepted service of the subpoena and forwarded it to the firm's attorneys (78). In response to this subpoena, at petitioner's direction, Mrs. Hammerstein made a search and gathered together whatever books and records of Brakes, Inc. she could find and these were delivered to the attorneys (101-102, 110-113), who in turn delivered them on January 4, 1956 to the Assistant United States attorney then in charge of the case (197).

This first subpoena called for the production of books and records relating to the Ordnance Department contract with Brakes, Inc. dated June 30, 1952, numbered DA-20-113-ORD-9981. The requested records were:

1. All sales and purchase invoices;
2. All inventory records;
3. Production records;
4. Cash disbursement journal; cash receipts journal;
5. General ledger and general journals;
6. Sales journals and purchase journals;
7. All receipts, memoranda, correspondence relating to above contract (184-185).

The delivered records consisted of:

1. General Journal—Jan. '47-Dec. '54—2 vols.;
2. General Ledger—Jan. '52—Dec. '54—1 vol.;
3. Accounts Receivable—Dec. '51—Jan. '54—5 cards; Ledger Cards
4. Cash Disbursements—June '52—Dec. '53—1 vol.;
5. Cash Receipts—June '52—Dec. '53—1 vol.;
6. Sales Journal—Jan. '53—Dec. '53—1 vol. and loose sheets.

Thus under this first subpoena nearly all the records requested were furnished. The omitted records relating to this single contract were sales and purchase invoices, inventory records, production records, purchase journals and receipts and miscellaneous memoranda and correspondence.

It is conceded that there never were any inventory records or production records maintained by Brakes, Inc., and the

district judge so found (152). There was apparently no specific purchase journal kept (79), although the district judge found that purchase journals up to September 1954 (one month before this firm went out of business) were produced, and sales journal up to December 1953 (four months before the lost government contract was completed) was produced (153).

Following the delivery of the books and records under this subpoena on January 4, 1956, nothing further was requested by government agents or attorneys. No one was called before the grand jury to authenticate the records produced or to explain any failure to produce the records which were not produced.

It is significant to observe that this first subpoena was served approximately 13 months after Brakes, Inc. went out of business; 8 months after it was formally and legally dissolved; and 20 months after completion of the last of the government contracts, which was not necessarily the contract described in the subpoena, for it is not known when this particular contract was completed and which of these many government contracts was the last one completed in April 1954. No question of a failure to produce records under this subpoena was raised until May 1957, an additional 17 months later, when petitioner was held to be in criminal contempt under it.

On May 3, 1957, a second subpoena *duces tecum,* addressed to "Lawrence Johnson, President" of Brakes, Inc. was served on petitioner (186-187). This subpoena called for the production before the grand jury of many of the same items listed in the first subpoena and previously produced, as well as certain other records. This subpoena also called for records relating to thirteen government contracts, in-

cluding the one referred to in the first subpoena (186-187).[2]

The only additional records requested were copies of the contracts and certificates of compliance and analysis: the other records had already been called for by the first subpoena, but may be considered to be enlarged in scope to cover the additional contracts listed.

A search of the premises of Brakes, Inc., now being operated by Brake Center, Inc., resulted in a few additional records being produced. Mrs. Hammerstein conducted this search for records under the direction of both petitioner and the grand jury (87-88, 101-103). Petitioner himself also made a search (6-10), and whatever was found was turned over to the government.

The non-produced records substantially are:

1. Copies of the contracts;
2. Sales and purchase invoices;
3. Certificates of compliance and analysis;
4. Receipts, memoranda and correspondence, which was interpreted to include "accounts receivables ledger cards" (152).

The produced records covered generally the periods ending either December 1953 or December 1954, which are dates fairly close to the completion of the last of the government contracts in April 1954, or to Brakes, Inc. going out of business in October 1954 or its legal dissolution in April 1955.

Again it is significant to observe that the non-produced records relating to the listed government contracts were called for in this second subpoena approximately 31 months

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[2] The contract numbers are set forth fully in the subpoena, but their last or identifying numbers are 11841, 12442, 20591, 20596, 611, 4693, 5057, 6740, 7441, 8439, 9228, 9981, 12244.

after Brakes, Inc. went out of business; 25 months after it had been legally dissolved; and 37 months after the completion of the last of the government contracts.

Petitioner was never shown to have had personal possession or direct supervision of any of the records called for in either one or both subpoenas (37-38, 188). Nevertheless, he was adjudged in criminal contempt for wilfully and contumaciously failing to produce the non-produced records of this dissolved corporation. The theoretical basis of this wording is that petitioner as former president of this dissolved corporation continued to have "legal" control over these records (158). The practical reason given for this contempt adjudication is the fact that records which were found and produced were found in the Long Island City plant of Brake Center, Inc., the former office of Brakes, Inc., where petitioner was still "boss" (158).

This contempt proceeding was commenced in the district court "with respect to the refusal [of petitioner] to answer questions as to the whereabouts of other books and records" (4). Subsequently the district judge directed that petitioner produce the non-produced records (41), and evidence touching on the possible existence of these records was then taken. The testimony taken in the hearings following the court's direction fails to show the existence of the non-produced records at the time of the service of the subpoenas. It is apparent from the testimony of the witnesses called by the government that whatever records could be found were delivered in response to the subpoenas, and that there are no other records in existence and none in the possession of or under the control of petitioner.

Only two witnesses were called who could possibly have any knowledge of the existence of the non-produced records. They were Frank Jaegler, a former employee of Brakes,

Inc. and Mrs. Ilse Hammerstein, the former head bookkeeper.[3]

Jaegler testified that he worked on the government contracts until they were completed in April 1954 and he maintained a file of contracts and compliance certificates. He last saw these records in April 1954 when he was transferred from the New York to the Brooklyn plant of Brakes, Inc. He quit his job in October 1954 by not returning to work after a vacation. He testified many people had access to these records, but between April and October 1954 he never had occasion to look into the record file. He had no knowledge about any of the records subpoenaed (56-73).

Mrs. Hammerstein was the principal government witness in this proceeding (74-126, 164-170). The district judge stated that his finding was based "largely upon the testimony of Mrs. Hammerstein who impressed me as a very intelligent witness" (153). Mrs. Hammerstein testified that she gathered together all the records she could find and that these were delivered to the attorneys. The substance of her testimony was that there were no other records in existence other than those produced (87-89). Also, at the time of the Bendix-Westinghouse litigation many records were not returned to their proper places (93). Later at the direction of the grand jury she made a further search for records, producing a few odds and ends found in old and disused files in the storage room (89). She also detailed the types of records formerly kept by Brakes, Inc. and its method of keeping records prior to the Labor Day 1954 move to Long Island City from New York. In the Long Island City plant there was less room for keeping records and besides, Brakes, Inc. soon went out of business.

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[3] In all, four witnesses were called by the government, the other two being Anthony Scudari, the FBI agent (49-55), and Harold [illegible] (127-130), an Internal Revenue agent. They had no knowledge of the facts in issue in this case.

As a government witness the government is bound by Mrs. Hammerstein's testimony; and this testimony does not support the district court's finding of continued existence of the records. Instead it supports and corroborates petitioner's own grand jury testimony that whatever was in existence was produced for the government.

Petitioner's testimony in this proceeding consisted of his grand jury testimony; he did not testify as a witness in the contempt hearings themselves. The substance of this testimony was that all the records which would be found were produced; that petitioner had none in his personal possession or under his control; that he did not personally supervise these records but that his office took care of them.

At the time of this proceeding petitioner had been arrested on a criminal complaint before the United States Commissioner and released in $5,000 bail on a charge of violation of Title 18, United States Code, Section 1001 (149, 161). Since these proceedings petitioner and others have been indicted in the district court in nine counts of false statements and conspiracy to defraud the United States (Title 18, United States Code, Secs. 1001, 371).[4]

The examination of petitioner before the grand jury discloses a concerted effort on the part of the prosecutor to compel petitioner to incriminate himself. Petitioner invoked his privilege against self-incrimination many times and the contempt proceeding was commenced with "respect to the refusal to answer questions as to the whereabouts of other books that we seek your [the court's] aid" (4).

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[4] This pending indictment names as defendants Brakes, Inc., Lawrence Johnson, Charles W. Libby, Joseph L. Wittman and Archie Stevens, and bears Docket No. C 153-171.

Reasons for Granting the Writ

The decision of the Court of Appeals below conflicts with the decision of this Court in *Curcio* v. *United States*, 354 U. S. 118, and other decisions both of this Court and other courts. The district judge's finding that the non-produced corporate records continue to exist is not supported by the evidence of record in the contempt hearings. Moreover, petitioner sufficiently showed in good faith both his attempted compliance with the direction of the district court to produce these records and that all existing records had been produced.

1. In *Curcio* v. *United States*, 354 U. S. 118, this Court directed entry of a judgment of acquittal of a defendant who failed to produce any of the subpoenaed records of which he was custodian. There Curcio refused to answer questions put to him before the grand jury touching upon his knowledge of the whereabouts of union books and records of which he was nominal or legal custodian, and at no time did he produce any of the subpoenaed records. Curcio stated simply that he did not have these records in his personal possession. This Court pointed out that a custodian of records cannot be held in contempt for refusing to answer questions concerning the whereabouts of non-produced records. This Court also pointed out in footnote 7 of its opinion that "petitioner might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*"; however instead of remanding the case for further proceedings on this ground or affirming the conviction for the bare non-production of the records, it directed Curcio's acquittal.

In the present case petitioner asserted his privilege against self-incrimination as to certain questions put to him before the grand jury, with the contempt proceeding being brought to compel him to answer these questions (4).

These questions touched on petitioner's knowledge of the whereabouts of the few non-produced records; or if he destroyed them or knew of their destruction (190-195, 188-189, 6-10, 13-18). The district judge held petitioner in contempt for the non-production of records without reference to the refusal to answer questions.

In light of the decision in *Curcio* and the cases on which it is based (*Wilson* v. *United States*, 221 U. S. 361; *United States* v. *White*, 322 U. S. 694, among others), it is apparent that the court below erred in failing to follow it.

2. The finding by the district judge that the non-produced records continue to exist is not supported by the evidence of record in the contempt hearings. Mrs. Hammerstein's testimony clearly negates this finding since her testimony repeatedly was to the effect that all the records which could be found were produced, and the government is bound by her testimony as she was its witness. Petitioner's grand jury testimony that he had none of these records in his personal possession, that the office people took care of the records and that all existing records were produced, also is not contradicted in the slightest regard.

In criminal contempt cases the usual rules of burden of proof and presumption of innocence of defendants continue. *United States* v. *Fleischman*, 339 U. S. 363. The burden of proof was at all times on the government in this case to prove beyond a reasonable doubt each element of the crime of criminal contempt. The presumption of innocence also attaches to petitioner in this case, as in any criminal case. It is in regard to these fundamental rules that the district judge's finding must be assessed. He stated in his oral finding it was his belief that the missing records continue to exist (152). This finding was based solely on a presumption of the continued existence of these non-produced records more than three years after any of these records were last seen, and it is not warranted by the evidence.

The question then becomes whether this presumption of continued existence of these records, which is the sole basis for the adjudication of criminal contempt here, is to overcome the presumption of innocence protecting petitioner. In the absence of direct proof that the non-produced records in this case actually continue to exist, the facts of record require a finding that the government has not met its burden of proof of petitioner's guilt beyond a reasonable doubt so as to overcome petitioner's presumption of innocence. In a clash between these two presumptions the presumption of innocence is stronger and must prevail. See *United States* v. *Fleischman*, *supra*, p. 363, footnote 10 and cases there cited; Wigmore, Evidence (3d Ed.) ¶ 2511.

Since the presumption of continued existence of the records may be considered a species of circumstantial evidence, such circumstantial evidence would be insufficient evidence of guilt for it would not exclude every reasonable hypothesis of innocence, such as the hypothesis that these records are no longer in existence. *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333; *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 193 F. 2d 907, 917.

This is not the case of a failure or refusal to produce records which are shown to exist or are concededly in existence. See *Nilva* v. *United States*, 352 U. S. 385; *United States* v. *Fleischman*, *supra*; *United States* v. *White*, *supra*; *Wilson* v. *United States*, *supra*. This case more clearly resembles the case of *United States* v. *Patterson*, 219 F. 2d 659 (C. A. 2d), where the Court of Appeals stated:

> "The defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control."

In the *Patterson* case the records sought were last shown to be in existence fourth months prior to the service of the subpoena; the contempt conviction was reversed under the circumstances of the case. Other cases where the presumption of continued existence of the records was held sufficient are *United States* v. *Goldstein*, 105 F. 2d 150 (11 days); and *In re Arctic Leather Garment Co.*, 89 F. 2d 871 (six weeks). In no case has a three year period been permitted as a basis for sustaining the presumption of the continued existence of records. And in this case the corporation whose records were sought had completed all government contracts in question and was both out of business and legally dissolved for periods of time up to 37 months before the contempt proceedings in May 1957.

3. Petitioner sufficiently showed in good faith both his attempted compliance with the district court's direction to produce these records and that all existing records had been produced in compliance with the subpoenas. Although the burden of proof does not shift to a defendant in a contempt case to prove his good faith compliance with the demands of the subpoena (*United States* v. *Fleischman*, *supra*, p. 363), nevertheless such defendant does have a burden of coming forward with proof to negate or refute the *prima facie* case made out by the prosecution. In this case the government never proved its case *prima facie;* and petitioner did show clearly that he had in good faith complied with the requirements of the subpoenas and the court's direction. *United States* v. *Patterson*, *supra*, p. 662; *Traub* v. *United States*, 232 F. 2d 43, 48. *Lopiparo* v. *United States*, 216 F. 2d 87, relied on much by the government and the court below is not authority contrary to petitioner's position here.

Since the government here started the contempt proceeding on the theory of petitioner's wrongful claim of personal

privilege as to questions touching his knowledge of the whereabouts of the non-produced records, its later shift to a contempt for failing to produce the few non-produced records, cannot be permitted to stand. *Curcio* v. *United States, supra; Cole* v. *Arkansas,* 333 U. S. 196, 202.

Finally, the failure of petitioner to produce the small number of records charged against him cannot be deemed wilful and contumacious, since there was substantial compliance with the subpoenas, and petitioner was never shown to have personal possession, direction or control over these non-produced records. See *United States* v. *Gordon,* 236 F. 2d 916, 920.

It is respectfully submitted that for the foregoing reasons this case warrants review by certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

August 30, 1957

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 398—October Term, 1956.

(Argued June 14, 1957 Decided August 6, 1957.)

Docket No. 24676

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAWRENCE JOHNSON,

Appellant.

Before:

CLARK, *Chief Judge,*
CHASE and HINCKS, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York. Walsh, *Judge.* Affirmed.

Under the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, the appellant was adjudged guilty of a criminal contempt of the court because of his willful failure to produce books and records pursuant to grand jury subpoenas *duces tecum* and was sentenced to imprisonment for sixty days. The sentence was not to be served if he purged himself from the contempt by producing the books and records before a day certain. He failed so to do; was ordered committed; and released in the custody of his attorney pending this appeal.

PAUL W. WILLIAMS, *U. S. Attorney for Appellee* (Robert W. Bjork, Arthur B. Kramer, Asst. U. S. Attorneys, of Counsel).

WILLIAM W. KLEINMAN, *Attorney for Appellant* (William W. Kleinman, Daniel H. Greenberg, Seymour J. Shapiro, of Counsel).

CHASE, *Circuit Judge*:

In 1955, and before, the appellant was the sole stockholder, a director and the president, of Brakes, Inc., a New York corporation a part of whose business was done under contracts with the government. In November 1955, a federal grand jury in the Southern District of New York was investigating charges that Brakes, Inc., had submitted to the government false statements relating to the performance of those contracts and a subpoena *duces tecum* calling for the production of designated books and records concerning one of the contracts was, on November 18, 1955, served on the person who told the marshal that she was the secretary-treasurer of the corporation. Though she was mistaken, no point is made as to any defect in the service of that subpoena and some, though not all, of the books and records called for were produced in response to it.

On May 2, 1957, while another grand jury was continuing the investigation, a second subpoena *duces tecum* was served, this time on the appellant as the president of the corporation. It called for the production of books and records relating to the same contract, some of which had been specifically mentioned in the first subpoena, and some not, and for those relating to twelve other contracts with the government. There was a partial compliance with the second subpoena on May 10, 1957, but only after the appellant had appeared before the grand jury and been directed by its foreman to search for the subpoenaed records and pro-

duce them. There was a further partial compliance on May 14, 1957 after another direction by the foreman; and still another on May 27, 1957, after the appellant had been adjudged in contempt and when he was attempting to purge himself from that.

After all this, compliance with the subpoenas was still incomplete because of the failure to produce called for books and records consisting of sales invoices; purchase orders, journals and invoices; certificates of compliance, records of shipments under each contract; correspondence; both account receivable and account payable ledger cards; and cash disbursements journal for the period from January 1950 to December 1951.

The appellant did not appear at the hearings before the court which resulted in his adjudication for contempt but in his appearances before the grand jury he was examined and on several occasions refused to answer questions on the ground that his answers might be incriminating. The judge held that all such refusals were justified and, as he was not directed to answer any such questions, he was not held in contempt for refusing to testify, the contempt consisting solely in his failure to produce what was specified in the subpoenas.

As to that, the position taken by the appellant before the grand jury and the district court, and now here, is that he did his best to comply with the subpoenas but was prevented from so doing because the things which were called for and not produced were neither under his control nor in existence when the subpoenas were served.

At the time of the service of the subpoenas, Brakes, Inc., had been voluntarily dissolved, that having been formally done on April 1955. Its business had been taken over by a corporation called Brakes Center, Inc. Previously some of its books and records had been kept at the place of business it had maintained on West 35th Street in Manhattan

and some at its plant in Long Island City. After its dissolution those in Manhattan were taken to the Long Island City premises which were taken over by Brakes Center, Inc. The appellant was not an officer of the last named corporation but was employed by it as its operating manager and no point is made that he could not have produced any of the books and records because they were in the possession of Brake Center, Inc., his position being, as above stated, that he did produce all that he was able to find.

Thus the two questions which this appeal presents are (1) whether the appellant because of his above-stated connection with Brakes, Inc., was, after its dissolution, legally responsible for the production of its books and records which were subpoenaed; and (2) whether the evidence was sufficient to support the finding below that the non-produced books and records were in existence when the subpoenas were served and could have been produced by him.

The first question is one of law and need not detain us long. Before the dissolution of Brakes, Inc., the appellant, by virtue of his relationship to the corporation, was in such control of its books and records that he might have been guilty of contempt if he had willfully refused to comply with a subpoena *duces tecum* served on the corporation. *Wilson* v. *United States*, 221 U. S. 361; *Lopiparo* v. *United States*, 8 Cir., 216 F. 2d 87. Upon the voluntary dissolution of Brakes, Inc., its directors were required under New York law, New York Corporation Law, Section 106(5), to preserve the corporate records until their destruction might be permitted by the court and no such order was shown to have been entered before the subpoenas were served. Consequently, the dissolution of the corporation did not, as a matter of law, relieve the appellant from his former responsibilty in respect to his duty to comply with a subpoena *duces tecum* requiring the production of corporate records.

And so the disposition of this appeal depends in the end upon the sufficiency of the evidence to support the finding of the district judge that the non-produced books and records were in existence when the subpoenas were served and could have been produced by the appellant had he been willing to do that. This issue being such that its solution is dependent upon the specific evidence in the case under consideration, prior decisions in cases somewhat similar are in no real sense controlling. In *United States* v. *Patterson*, 2 Cir., 219 F. 2d 659, upon which the appellant much relies, decision turned on a close question of fact presented by the particular evidence in that record which was, by a divided court, held insufficient to support the findings on which the contempt judgment was based. Had the evidence been different, of course, the result on appeal might have been different. The evidence here is sufficiently different to produce a different result. There is, accordingly, no conflict in respect to legal principles between the *Patterson* case and this. Applying those stated there to the evidence here, we are satisfied that the findings below were amply supported by evidence from which the judge found that the non-produced books and records which were subpoenaed were in existence when the subpoenas were served. Admittedly there was non-compliance. The burden was then upon the appellant to show that he had in good faith tried to comply. *United States* v. *Fleischman*, 339 U. S. 349; *United States* v. *White*, 322 U. S. 694. The district judge gave him a fair and reasonable opportunity to do that and we agree with the judge's conclusion that he failed to show that he did in good faith attempt to obey the subpoenas. The absence of such a showing leaves his adjudication and sentence for contempt without error. *Nilva* v. *United States*, 352 U. S. 385.

Affirmed.